SUPREME COURT, U. S.

FILED
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No. 74-1331

In the Supreme Court of the United States

October Term, 1974

CITY OF PHILADELPHIA, et al.,
Petitioners,

vs.

GEORGE P. BAKER, et al.,
Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Third Circuit

BRIEF IN OPPOSITION FOR NATIONAL RAILROAD PASSENGER CORPORATION

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BRIEF IN OPPOSITION FOR NATIONAL RAILROAD PASSENGER CORPORATION

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 508 F.2d 279 and is reproduced in the Appendix to the Petition at 1a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(c).

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that these actions are barred by reason of Title II of the Rail Passenger Service Act of 1970 on the ground that they seek to overturn determinations made by the Secretary of Transportation as part of his designation of a Basic System of intercity rail passenger transportation, which determinations are not "reviewable in any court" by reason of Section 202 of that Act, 45 U.S.C. § 522.

2. Whether, in any event, these actions are barred by reason of Section 307(a) of the Rail Passenger Service Act of 1970, 45 U.S.C. § 547(a), on the ground that such actions are maintainable, if at all, only by the Attorney General of the United States.

STATUTES INVOLVED

The statutes principally involved are Sections 201 and 202 of the Rail Passenger Service Act of 1970, 45 U.S.C. §§ 521 and 522, which are set out in the Petition (Pet. 4-5), and Section 307(a) of such Act, 45 U.S.C. § 547(a), which is set out below.

> "§ 547. Jurisdiction of the district courts of the United States to impose sanctions
>
> "(a) If the Corporation [i.e., respondent] or any railroad engages in or adheres to any action, practice, or policy inconsistent with the policies and purposes of this chapter, obstructs or interferes with any activities authorized by this chapter, refuses, fails, or neglects to discharge its duties and responsibilities under this chapter, or threatens any such violation, obstruction, interference, refusal, failure, or neglect, the district court of the United States for any district

in which the Corporation or other person resides or may be found shall have jurisdiction, except as otherwise prohibited by law, upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any employee affected thereby, including duly authorized employee representatives, to grant such equitable relief as may be necessary or appropriate to prevent or terminate any violation, conduct, or threat."

STATEMENT OF THE CASE

Petitioners are the City of Philadelphia, the Commonwealth of Pennsylvania, the Pennsylvania Public Utility Commission and the United Transportation Union.[1] Respondents are the Trustees of the Property of Penn Central Transportation Company, Debtor (the "Trustees"), National Railroad Passenger Corporation ("Amtrak") and the United States.

The Trustees and Amtrak contracted in April, 1971 pursuant to pertinent provisions of the Rail Passenger Service Act of 1970, 45 U.S.C. § 501, *et seq.* (the "Act"), to relieve the Trustees from their responsibility for provision of intercity rail passenger service. On May 1, 1971, as a result of this contractual arrangement and pursuant to Section 401(a)(1) of the Act, 45 U.S.C. § 561(a)(1), the Trustees discontinued certain trains at issue here: their 200-series trains between Philadelphia and New York City and their 600-series trains between Philadelphia and Harrisburg (collectively, the "Trains").[2]

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[1] The State of New Jersey had participated as a complaining party up to the time of oral argument in the Court of Appeals. It appeared at that argument to announce that it was dismissing its complaint, with prejudice, and subsequently filed a Stipulation of Dismissal. (508 F.2d at 280 n.2; P. App. 5a n.2).

[2] Since May 1, 1971, Amtrak has operated its own intercity service between the two city pairs.

The Trains had previously been identified by the Secretary of Transportation in his Final Report to Congress dated January 28, 1971 pursuant to Title II of the Act as trains then operated by the Trustees over routes designated by him as part of the "Basic System" of intercity rail passenger service which he was required to designate under, and which is not "reviewable in any court" by reason of, such Title II.[3] (45 U.S.C. §§ 521 and 522).

On April 28, 1971, petitioners filed suit in the United States District Court for the Eastern District of Pennsylvania charging that the Trustees' proposed discontinuance of the Trains would violate the Act on the ground that the Trains were commuter rather than intercity trains. The District Court was asked to enjoin the Trustees from implementing the discontinuances and to refer the question of the intercity versus commuter character of the Trains to the Interstate Commerce Commission (the "ICC") under 28 U.S.C. § 1336(b).

On April 30, 1971, in the Penn Central reorganization proceedings it was ordered that petitioners "proceed forthwith before the Interstate Commerce Commission to the end that this Court shall be advised" concerning the intercity versus commuter character of the rail service involved. (Order No. 244 appended hereto at R. App. 1a). The Reorganization Court carefully refrained from characterizing the legal effect of the "advice" which it sought from the ICC, noting that "it is unnecessary to decide the precise basis for referral". (329 F. Supp. at 577; P. App. 22a).

On June 24, 1971 and July 26, 1971, the ICC rendered reports in which it stated that in its view the Trains were not intercity rail passenger service within the meaning of the Act. *Penn Central Transportation Company*

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[3] See Section I below. A copy of the Final Report was annexed as Exhibit I to Amtrak's Memorandum in the District Court dated December 1, 1971 in Support of its Motion to Dismiss. Pertinent pages therefrom are appended hereto at R. App. 3a-8a.

(Debtor) — Status of Certain Passenger Service, 338 I.C.C. 621 and 690 (1971); P. App. 34a and 73a. The ICC issued no orders. It expressly found in each case that "no order is necessary". (338 I.C.C. at 641 and 703; P. App. 54a and 86a). The reports were issued solely on an advisory basis and as a result of the Reorganization Court's Order dated April 30, 1971 directing that it be "advised" as to the intercity versus commuter character of the Trains. (338 I.C.C. at 622, 641, 691 and 703; P. App. 35a, 54a, 74a and 86a).

On September 22, 1971, petitioners filed a second suit seeking to "enforce" the reports of the ICC.

Amtrak moved in the District Court to dismiss the complaints on the ground that these actions are barred by Sections 202 and 307(a) of the Act, 45 U.S.C. §§ 522 and 547(a). The District Court granted such motions. (370 F. Supp. 22; P. App. 24a).

The Court of Appeals unanimously affirmed (508 F.2d 279; P. App. 1a), holding that the Trustees' discontinuance of the Trains (and Amtrak's decision to operate its own service between the city pairs in question) "were beyond judicial review" because the Trains had been designated as intercity by the Secretary of Transportation in his Final Report to Congress under Section 202 of the Act, 45 U.S.C. § 522, and characterized such Report as "a document culminating a process essentially legislative in nature" which Congress intended to "be subject to review only in the legislative branch". (508 F.2d at 282; P. App. 8a, 9a). Because of its disposition of the controversy on these grounds, the Court of Appeals did not consider it necessary to pass on Amtrak's second contention that, by reason of this Court's decision in *National Railroad Passenger Corporation* v. *National Association of Railroad Passengers*, 414 U.S. 453 (1974), Section 307(a) of the Act, 45 U.S.C. § 547(a), bars actions such as these unless brought by the Attorney General of the United States. (508 F.2d 283 n.5; P. App. 10a n.5).

REASONS FOR NOT GRANTING THE WRIT

I. The Decision of the Court of Appeals Holding that, Under the Particular Circumstances of This Case, Petitioners Cannot Attack a Non-reviewable Determination of the Secretary of Transportation Does Not Present Any Important or Recurring Question of Law Requiring Consideration by This Court.

This litigation involves a single moment in time more than four years ago – May 1, 1971 – the date by which Congress directed that railroads must contract with Amtrak if they wished to discontinue their intercity rail passenger trains (45 U.S.C. § 561(a)(1)) and the date upon which Congress directed that Amtrak must commence providing intercity rail passenger service (45 U.S.C. § 561(b)). The sole issue which petitioners seek to litigate is the propriety of particular train discontinuances by a particular railroad on that particular day. (Pet. 5, 6).

As their first reason in support of granting the writ, petitioners urge that identification of the "person or agency to determine the commuter character of a passenger train is an important and pressing federal question" (Pet. 9), that the "decision below conflicts with rulings of this Court and in two circuits" *(ibid.)* and that the question presented here should be committed to the "primary jurisdiction and/or expertise" of the ICC. (Pet. 12).

Petitioners do not cite, however, and Amtrak is not aware of, any other cases still pending which present the commuter versus intercity issue with respect to railroad discontinuances effected pursuant to the Act on May 1, 1971. The Trustees discontinued the Trains pursuant to a specific statutory provision which required that such discontinuances be accomplished on May 1, 1971. (45 U.S.C. § 561(a)(1)). Any petition questioning the propriety of action taken on that date under that provision does not present an "important and pressing federal question" of any kind, but is, instead, a request that this Court commit its re-

sources to the disposition of the last remaining controversy challenging train discontinuances in a unique setting where the terms of the Act and the passage of time virtually insure that no comparable case will again arise.

There is no conflict between the decision of the court below and any of the cases relied on by petitioners. (Pet. 9-11). None of these cases involved consideration of Title II of the Act, the statutory provision relied on by the Court of Appeals to dispose of this controversy; and all of such cases were decided before this Court's decision in *National Railroad Passenger Corporation* v. *National Association of Railroad Passengers*, 414 U.S. 453 (1974), where this Court held that only the Attorney General of the United States may sue to enforce the provisions of the Act.[4]

Petitioners advance no statutory or other support for the claimed ICC "primary jurisdiction" in respect of railroad discontinuances effected on May 1, 1971. Indeed, although the ICC was a party to the portion of these proceedings which commenced in the Reorganization Court, it did not appear in the Court of Appeals to assert "primary" or any other kind of jurisdiction in this controversy. In fact, subsequent to the District Court's decision in these cases, the ICC itself characterized its own role as merely having

> "issued advisory opinions to the [district] court following its requests to us for advisory opinions regarding the 'intercity' nature of the service in question."[5]

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[4] Subsequent to the decision in that case, petitioners have sought to avoid its impact by characterizing their claims as arising under "state law". All such claims against Amtrak are, of course, barred by Section 306(c) of the Act, 45 U.S.C. § 546(c):

> "[Amtrak] shall not be subject to any State or other law pertaining to the transportation of passengers by railroad as it relates to rates, routes, or service."

[5] "Report to the President and the Congress; Amtrak – Effectiveness of the Act; by the Interstate Commerce Commission; March 15, 1974" at I, 6.

Finally, petitioners' claim that the Court of Appeals "erroneously construed the 'Basic System'" (Pet. 13) is without merit and certainly does not present any issue which warrants the attention of this Court.

Section 202 of the Act, 45 U.S.C. § 522, required the Secretary of Transportation to designate in January, 1971 a "Basic System" of intercity rail passenger service and provided that:

> "The basic system as designated by the Secretary shall become effective for the purposes of this [Act] upon the date that the final report of the Secretary is submitted to Congress *and shall not be reviewable in any court.*"[6]

Under the Act, the Basic System deals only with *intercity* rail passenger service. Section 102(4), 45 U.S.C. § 502(4), specifies that the Basic System "means the system of *intercity* rail passenger service designated by the Secretary under [Title] II . . . of this [Act]". The Secretary was restricted solely to *intercity* passenger service in performing his statutory duty of developing the Basic System.

Under Title II of the Act, the Secretary's "recommendations for the basic system" were to include, among other things, the identification of:

> ". . . all routes over which service may be provided [by Amtrak], *and the trains presently operated [by the railroads] over such routes . . .*"

This required identification of trains operating prior to May 1, 1971 over specified routes was thus an integral part of the non-reviewable Basic System.

In his Final Report on the Basic System, *the Secretary identified the Trains as intercity trains.* This identification appears at pages II-9 and II-14 of his Final Report and

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[6] Emphasis here and elsewhere is supplied.

reflects the Secretary's non-reviewable determination that the Trains were intercity, not commuter, in character.[7]

The Secretary having identified the Trains as intercity for the purposes of the Act, Section 202 thereof, 45 U.S.C. § 522, states without qualification that this identification is "not . . . reviewable in any court". The Court of Appeals therefore correctly concluded that it could not review the propriety of the Trustees' discontinuance. "The explicit words of the statute, 45 U.S.C. § 522, that the basic system 'shall not be reviewable in any court,' are clearly sufficient to indicate that Congress intended no judicial review." *Quincy College and Seminary Corporation* v. *Burlington Northern, Inc.*, 328 F. Supp. 808 at 811 (N.D. Ill. 1971), *aff'd*, 405 U.S. 906 (1972).

II. The Writ Should Be Denied in Any Event because Section 307(a) of the Act Precludes, and This Court Has Held that It Precludes, These Petitioners from Maintaining These Actions.

Although the Court of Appeals found it unnecessary to decide the issue,[8] petitioners are precluded from maintaining these actions by this Court's decision in *National Railroad Passenger Corporation* v. *National Association of*

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[7] Pages II-9 and 10 and pages II-13 through 16 of the Final Report are set out at R. App. 3a-8a. In order to make the required identification of intercity trains, it was necessary for the Secretary to develop standards by which he would omit trains providing commuter service within the definition of Section 102(5)(A) of the Act, 45 U.S.C. § 502(5)(A). These standards are contained in the Final Report:

> "For purposes of designating the Basic System this [commuter] definition was considered to mean service which covers distances of fifty miles or less, with stops at not more than five-mile intervals." Final Report at I-4 n.1.

The 200-series trains and the 600-series trains operated over distances of 90 and 103 miles, respectively.

[8] 508 F.2d at 283 n.5; P. App. 10a n.5.

Railroad Passengers, 414 U.S. 453 (1974), holding that Section 307(a) of the Act, 45 U.S.C. § 547(a), bars actions of the kind presented here when brought by parties other than the Attorney General of the United States.

Petitioners are, in substance, contending that the Trustees' May 1, 1971 discontinuance of the Trains exceeded the authority conferred on them by Section 401(a)(1) of the Act, 45 U.S.C. § 561(a)(1)[9]. Such Section authorized the Trustees to obtain relief from "all of [their] responsibilities as a common carrier of passengers by rail in intercity rail passenger service," and to discontinue all of their intercity rail passenger trains, if they should, prior to May 1, 1971, as they in fact did, enter into a contract with Amtrak "to relieve [them] of [their] entire responsibility for the provision of" such service. Such a contract was approved by the Penn Central Reorganization Court on April 27, 1971. *In re Penn Central Transportation Company, Debtor (In re Amtrak Contract)*, 329 F. Supp. 477 (E.D. Pa. 1971).

This Court's prior consideration of Section 307(a) involved an identical issue. In that case, The Central of Georgia Railway Company ("Central") had entered into a contract with Amtrak, pursuant to Section 401(a)(1) of the Act, relieving Central of its entire responsibility for the provision of intercity rail passenger service from and after May 1, 1971. The plaintiffs there contended that Central had exceeded its authority to contract under that Section because its parent, Southern Railway Company, had not itself entered into a similar contract with Amtrak.[10]

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[9] Petitioners have, in order to avoid the controlling effect of this Court's decision, latterly sought to claim that their suits are based on "state law" (*e.g.*, Pet. 18). However, petitioners' complaint filed on April 28, 1971 specifically alleged that it "is brought pursuant to 28 U.S.C. 1331, 1337 and 45 U.S.C. 501 et seq." [the Act]. (Compl., para. III).

[10] 414 U.S. at 455 n.3.

It was therefore claimed that, since the Central-Amtrak contract allegedly was not authorized by the Act, Central could not lawfully discontinue its intercity passenger trains.[11]

This Court held that the dispute then before it, which challenged the right of a railroad to take certain actions under authority of the Act, was barred by Section 307(a) and thus concluded that the plaintiffs there could not challenge Central's discontinuance of its trains:

> "Congress . . . clothed the Attorney General with the *exclusive* (except in cases involving labor agreements) authority to police the Amtrak system and to enforce the various duties and obligations imposed by the Act. . . .
>
> ". . . [W]e hold that § 307(a) provides the *exclusive* remedies for breaches of any duties or obligations imposed by the Amtrak Act, and that no additional private cause of action to enforce compliance with the Act's provisions can properly be inferred. . . ." 414 U.S. at 464-465.

This holding, which dismissed private claims as to alleged violations of the Act by Central, is equally applicable here. Section 307(a) precludes these petitioners from asserting that the Trustees exceeded their authority under the Act in discontinuing the Trains on May 1, 1971.

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[11] ". . . Since § 401(a)(1) authorizes only a contract for Amtrak to undertake a railroad's *entire* responsibility for intercity rail passenger service, the respondent contends that Southern cannot relieve itself of only *part* of this responsibility by allowing a subsidiary to contract with Amtrak while declining itself to do so. Accordingly, the respondent argues that Southern and Central, having entered no statutorily authorized contract with Amtrak, are prohibited . . . from discontinuing any passenger train. . . ." *Ibid.* (Emphasis by the Court).

CONCLUSION

For the foregoing reasons, respondent, National Railroad Passenger Corporation, submits that the petition of City of Philadelphia, et al., for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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RESPONDENT AMTRAK'S APPENDIX

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Order No. 244 of Penn Central Reorganization Court	R. App. 1a
Extracts from Final Report of the Secretary of Transportation on Basic National Rail Passenger System dated January 28, 1971	R. App. 3a

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In the Matter of PENN CENTRAL TRANSPORTATION COMPANY, *Debtor*	In Proceedings for the Reorganization of a Railroad Bankruptcy No. 70-347

Order No. 244
Referring Certain Matters to the Interstate Commerce Commission

AND Now, this 30th day of April, 1971, it appearing that the City of Philadelphia, the Commonwealth of Pennsylvania, the Pennsylvania Public Utility Commission, The United Transportation Union, The Commissioner of Transportation of the State of New York, and the Department of Transportation of the State of New Jersey, have filed complaints or otherwise raised issues with respect to the treatment of certain transportation facilities designated as intercity passenger trains by the National Rail Passenger Corporation (Amtrak), and with respect to the treatment of certain facilities not so designated, it is ORDERED that the above named parties shall proceed forthwith before the Interstate Commerce Commission to the end that this Court shall be advised within 90 days on the following matters:

1. Whether trains Nos. 600 through 617 between Harrisburg, Pennsylvania, and Philadelphia, Pennsylvania, trains Nos. 200 through 298 between Philadelphia, Pennsylvania, and New York, New York, and trains Nos. 22, 23, 176 and 177 within the State of New Jersey, constitute "intercity rail passenger service" within the meaning of § 102(5) of the Rail Passenger Service Act of 1970, P.L. 91-518; and to the end that this Court shall be advised within 30 days on the following matters:

2. Whether trains Nos. 922, 935, 955, 9009, 9014, 9019, 9030, and 9044 between New York, New York, and Chatham, New York, and buses Nos. 0552, 0553, 0557, 0558, 0559, 0560, and 0572 between Lancaster, Pennsylvania, and York, Pennsylvania, constitute "intercity rail passenger service" within the meaning of the same Statute.

IT IS FURTHER ORDERED that the Commission may, within 30 days, apply to this Court, upon cause shown, for an extension of time to complete the determinations required under Paragraph 2 above, no such extension to exceed an additional 30 days.

/s/ JOHN P. FULLAM

J.

II - 9

NEW YORK - WASHINGTON

I. POINTS BETWEEN WHICH INTERCITY PASSENGER TRAINS SHALL BE OPERATED· NEW YORK - WASHINGTON

II. ROUTES OVER WHICH SERVICE MAY BE PROVIDED:

The alternative routes shown, over which service may be provided, have been divided into segments at certain points in order to facilitate the clear identification of route options. The Corporation may provide intercity rail passenger service over those routes identified or any combination thereof. The listing of any point, other than New York and Washington, is not intended to suggest that the Corporation is required to provide service to that point.

New York - Washington Segment

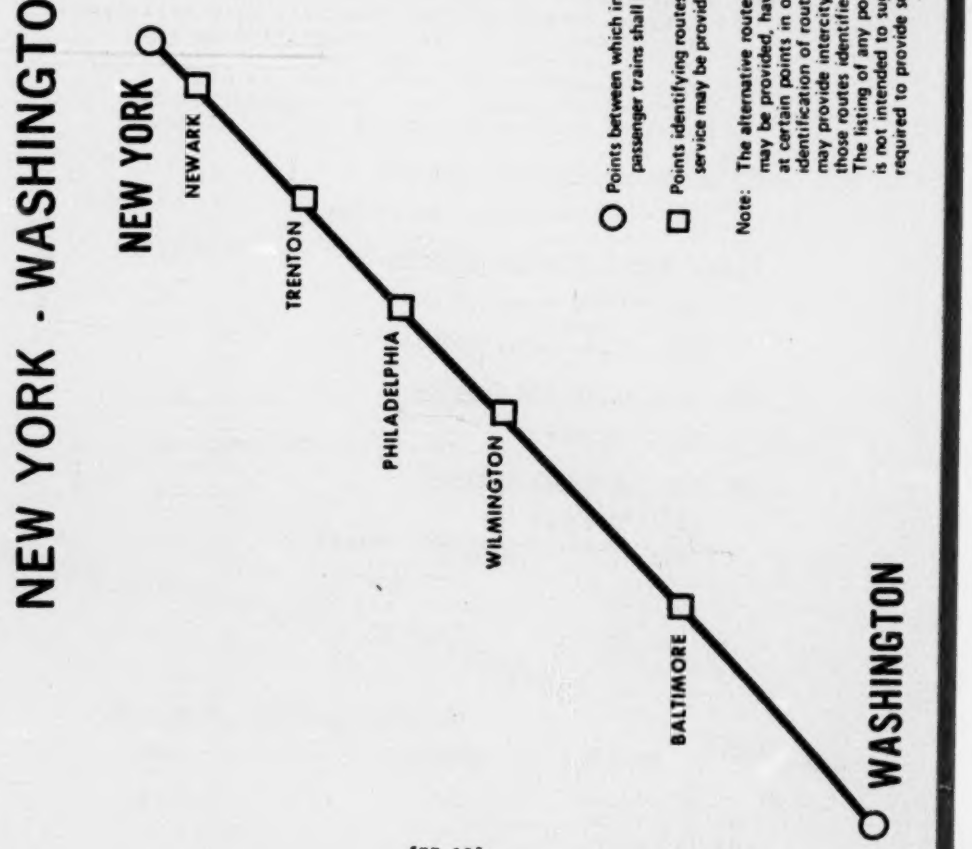
via - Newark, Trenton, Philadelphia, Wilmington, Baltimore.

III. TRAINS PRESENTLY OPERATED OVER SUCH ROUTES:

Includes all trains presently operating over all or any portion of routes listed.

New York - Washington Segment

Via	Carrier	Trains
Newark, Trenton Philadelphia, Wilmington, Baltimore	PC	#25,101,103,105,107, 109,111,113,131,133, 135,137,139,143,145, 147,155,159,161,163, 165,171,173,175,177, 201,207,211,213,215, 219,221,223,225,227, 231,235,263,401.
		#54,100,102,104,106, 108,110,112,126,130, 132,140,142,144,152, 154,158,166,170,172, 174,176,202,204,206, 208,212,218,220,234, 254,256,272,282,298.



II - 13

NEW YORK - CHICAGO

I. POINTS BETWEEN WHICH INTERCITY PASSENGER TRAINS SHALL BE OPERATED: NEW YORK - CHICAGO

II. ROUTES OVER WHICH SERVICE MAY BE PROVIDED:

The alternative routes shown, over which service may be provided, have been divided into segments at certain points in order to facilitate the clear identification of route options. The Corporation may provide intercity rail passenger service over those routes identified or any combination thereof. The listing of any point, other than New York and Chicago, is not intended to suggest that the Corporation is required to provide service to that point.

New York - Pittsburgh Segment

via - Philadelphia, Harrisburg

Pittsburgh - Chicago Segment

via - Fort Wayne
via - Deshler
via - Cleveland, Toledo

New York - Buffalo Segment

via - Albany

Buffalo - Chicago Segment

via - Detroit
via - Erie, Cleveland, Toledo

III. TRAINS PRESENTLY OPERATED OVER SUCH ROUTES:

Includes all trains presently operating over all or any portion of routes listed.

New York - Pittsburgh Segment

Via	Carrier	Trains
Philadelphia, Harrisburg	PC	See "New York-Washington" for New York-Philadelphia trains #23,25,31,33,49,55, 601,603,605,607,609, 611,613,615,617,4, 16,22,24,48,50,54, 600,602,604,606,608, 610,612,614.

Pittsburgh - Chicago Segment

Via	Carrier	Trains
Fort Wayne	PC	#23,49,53,55,24, 48,50,54.
Deshler	B&O	#5,7,6,8.
Cleveland, Toledo	PC	#27,51,63,28,64,98.
	GTW	#155,159,165,156, 158,164.
	CSS&SB	#1,3,5,9,311,13,315, 17,319,21,27,29,31, 33,35,8,310,10,12, 16,316,20,320,24, 326,28,328,34,334, 36,40,340,42.

New York - Buffalo Segment

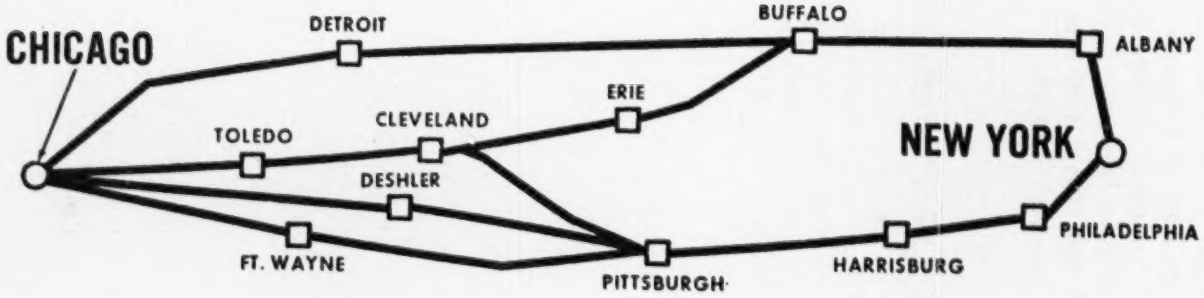
Via	Carrier	Trains
Albany	PC	#61,63,71,73,75,81, 83,85,62,64,70,72, 74,80,82,84.

III. TRAINS PRESENTLY OPERATED OVER SUCH ROUTES: (Cont'd)

Buffalo - Chicago Segment

Via	Carrier	Trains
Detroit	PC	#17,351,355,14, 52,356.
	GTW	#155,159,165,169, 156,158,164,168.
	C&O	#11,15,12,14.
Erie, Cleveland, Toledo	PC	#21,51,63,28,64,98.
	GTW	#155,159,165,156, 158,164.
	CSS&SB	#1,3,5,9,311,13,315, 17,319,21,27,29,31, 33,35,8,310,10,12, 16,316,20,320,24, 326,28,328,34,334, 36,40,340,42.

NEW YORK - CHICAGO



[II-16]

○ Points between which intercity passenger trains shall be operated.

□ Points identifying routes over which service may be provided.

Note: The alternative routes shown, over which service may be provided, have been divided into segments at certain points in order to facilitate the clear identification of route options. The Corporation may provide intercity rail passenger service over those routes identified or any combination thereof. The listing of any point, other than New York-Chicago is not intended to suggest that the Corporation is required to provide service to that point.

R. App 8a

CERTIFICATE OF SERVICE

Pursuant to Rule 33 of the United States Supreme Court, copies of the foregoing Brief of Respondent, National Railroad Passenger Corporation, in Opposition to Petition for Writ of Certiorari have been sent by United States mail, postage prepaid, this 20th day of May, 1975 to counsel identified on the attached Schedule A.

/s/ PATRICK F. MCCARTAN

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Schedule A

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